



March 30, 2022

The Honorable Ron Wyden
Chairman
Senate Committee on Finance
SD-219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Mike Crapo
Ranking Republican Member
Senate Committee on Finance
SD-219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Richard Neal
Chairman
House Committee on Ways and Means
1102 Longworth House Office Building
Washington, DC 20515

The Honorable Kevin Brady
Ranking Republican Member
House Committee on Ways and Means
1011 Longworth House Office Building
Washington, DC 20515

Dear Chairman Wyden, Ranking Member Crapo, Chairman Neal, and Ranking Member Brady:

BSA | The Software Alliance¹ appreciates your leadership and hard work on the many important issues found in S. 1260, *the United States Innovation and Competition Act of 2021* (USICA) and HR 4521, the *America COMPETES Act*. We commend both chambers for their commitment to fostering scientific research and advancing technological capacity, including in software.

BSA is the leading trade association representing the global enterprise software and technology industry. Digital transformation, and the software that enables it, is essential to businesses of all sizes and every industry. Our members provide cutting-edge cloud services, data analytics, manufacturing and infrastructure tools, and other digital capabilities to help businesses modernize and grow. The software industry contributes \$1.9 trillion to the US economy; invests over \$100 billion in US private sector R&D each year; and supports nearly 16 million US jobs, including 12.5 million (over 80%) outside the tech sector. 67% of new US science, technology, engineering, and mathematics jobs are in computing and software, and 40% of US manufacturers urge further growth of the US workforce in digitally skilled advanced manufacturing positions. There is considerable room for growth, with 1.5 million software jobs open for American workers.

This letter elaborates on the issue of outbound investment screening, which we introduced in our letter of March 14, 2022. The National Critical Capabilities Defense Act (the Act) provides for a new “Committee on National Critical Capabilities,” an interagency group to be led by the Office of the US Trade Representative (USTR), that would review a broad swath of transactions conducted by US businesses abroad. As reflected in BSA’s report on Effective ICT Supply Chain Security, BSA endorses the need to manage supply chain security risk. However, we do not support inclusion of the outbound investment screening framework in the Act for the reasons detailed below.

Before moving forward with this legislative proposal, Congress should take steps to coordinate more closely with ongoing outbound investment-focused initiatives in the Executive Branch that are already

¹BSA’s members include: Adobe, Alteryx, Atlassian, Autodesk, Bentley Systems, Box, Cisco, CNC/Mastercam, DocuSign, Dropbox, IBM, Informatica, Intel, MathWorks, Microsoft, Okta, Oracle, PTC, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

occurring under the authority of EO 14017, EO 14034, 86 FR 67379, and related departmental reports and action plans. The White House, the Department of Commerce, and the Department of Homeland Security (among others) are currently leading a substantial effort to build supply chain resilience, invest in future ICT technologies, and revitalize the US ICT manufacturing base and workforce. These efforts also encompass processes to review transactions involving outbound investment in technology that pose risks to US national and supply chain security, among other priorities. These ongoing policy processes supplement existing export control and sanctions frameworks managed by the Departments of Commerce, State, and Treasury. We urge Congress to allow this Executive Branch process to progress before legislating in ways that may be duplicative or inconsistent.

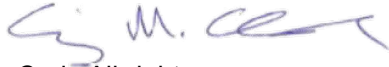
We also have a range of specific concerns regarding the Act. Broadly speaking, we are concerned that, as written, the measure could stifle American companies' ability to compete in global markets and introduce significant difficulties for both the government and private sector to comply with the statute. Among other things, the measure:

- Has enormous consequences for US companies with activities abroad and deserves careful scrutiny far beyond what has been afforded to date. As drafted, the Act covers the entirety of the supply chain for articles in a large number of sectors. A January 2022 Rhodium Group and National Committee US-China Relations Report finds that almost half of all US FDI transactions into China from 2000 to 2019 would be captured by the industry classifications identified in the Act (i.e., 43 percent of all FDI, totaling \$110 billion). This extremely broad commercial impact raises questions as to whether the Act is properly focused on US security and supply chain priorities. This broad commercial impact also implies a significant potential impact on American jobs and American workers – an aspect of the Act that has not been assessed. Given the risk of unintended consequences, it would be preferable to develop a more calibrated and detailed approach to these issues.
- Could result in conflicts with longstanding US sanctions and export controls legal frameworks (administered by the Departments of Treasury, State, and Commerce), and with competition and antitrust law frameworks governing mergers and acquisitions (administered by the Department of Justice and the Federal Trade Commission). The measure would likely also conflict with the above-referenced supply chain and outbound technology transaction review processes that are being led by the White House and Departments of Commerce and Homeland Security.
- Could undermine the effectiveness of USTR in prosecuting its core mission of leading US international trade policy, particularly given USTR's lack of resources and expertise in administering a program on the scale of the proposed Committee on National Critical Capabilities. The proposed Committee's remit and number of filings is likely even larger than the Committee on Foreign Investment in the United States, in light of the scope issues and the mandatory nature of filing under the Act.
- Could imperil US technology leadership by making it harder for US companies to maintain visibility and access to overseas technology that can be purchased or licensed to make US business and manufacturing operations more competitive. Because foreign competitors from the EU, Japan, Korea and elsewhere would face no similar restraints, American companies would face a competitive disadvantage.
- Has a vague and overbroad scope, as it covers not merely investment, but a broad swath of operational decisions that firms take on a routine basis. Greater clarity is necessary concerning what activities are outside the scope of the law, particularly given ambiguity regarding intra-company decisions and the mandatory filing required under the Act. For example, the Act does not exclude: (i) indirect transactions or contracts, (ii) foreign subsidiaries or affiliates of US

businesses, or (iii) intra-company transfers. The Act could also sweep in contracts executed prior to the effective date, where new transactions or statements of work under the contract occur after the effective date. Failure to provide relevant carve-outs in these areas would dramatically increase the Act's negative impacts on US technology leadership and existing US-based operations that provide sales and support to foreign affiliates.

We would welcome the opportunity to work with you and your staff to address these issues in the final product of the USICA/COMPETES conference process. Thank you for your leadership, and we look forward to working with you.

Sincerely,

A handwritten signature in blue ink, appearing to read "C. M. Albright", written over a horizontal line.

Craig Albright
VP, US Government Relations